88-1204

Supreme Court, U.S.
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No._____

UNITED STATES SUPREME COURT

October Term, 1988

ALFRED AVINS and NORTHERN VIRGINIA LAW SCHOOL,
Petitioners,

v.

VIRGINIA COUNCIL OF HIGHER EDUCATION, STANLEY E. HARRISON, JOAN S. JONES, WILLIAM C. BATTLE, ROBERT L. BURRUS, WHITTINGTON W. CLEMENT, BERNARD J. HAGGERTY, RUBY G. MARTIN, HUGH L. PATTERSON, ABE J. SPERO, WILLIAM B. SPONG, Jr., STEPHEN J. WRIGHT, and ATTORNEY GENERAL MARY SUE TERRY by RICHARD C. KAST,
Respondents

Petition for a Writ of Certiorari to the Supreme Court of Virginia

PETITION

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370-3010

QUESTIONS PRESENTED

1. Whether a State may constitutionally make it a crime to teach the history of the United States Constitution in a law school.

2. Whether political opponents on a state regulatory board may constitutionally censor a law teacher's course because they disagree with his views in giving the course.

3. Whether a state statute which delegates unlimited control of courses in private educational institutions to a state regulatory board violates the 1st Amendment as incorporated into the 14th Amendment, of the United States Constitution.

4. Whether a state board which sets policy for state law schools and refuses to allow state law schools to accept transfer credit for a course not given therein from a non-accredited private law school because the rules of the accreditation agency prohibit accredited American law

schools from accepting transfer credit from non-accredited American law schools, although allowing transfer credit from foreigh law schools, violates the anti-trust laws and 1st Amendment (14th Amendment) rights of the students, teacher, and non-accredited law school.

5. Whether the termination of the license of a school which meets state quality standards to grant degrees because of financial inability to meet arbitrary accreditation agency requirements irrelevant to its quality or mission violates the 14th (1st) Amendment rights of the school, its teachers, and its students.

6. Whether a state review process regarding 1st Amendment rights extending over two years violates the 1st (14th) Amendment.

7. Whether the Attorney General of Virginia was properly made a party.

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REPORTS DELIVERED BELOW

The opinions of Alexandria Circuit Court and Virginia Supreme Court are annexed.

JURISDICTION

The judgment of the Virginia Supreme Court was rendered on November 22, 1988. Jurisdiction is conferred by 28 U.S.C. sec. 1257, on this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment 1: "Congress shall make no law ... abridging the freedom of speech...."

Amendment 14: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Virginia Code, sec. 23-267:"(2) No institution of higher education formed ... in the Commonwealth ... may confer or award degrees ... unless such institution receives approval from the Council in accordance with the provisions of this chapter."

Virginia Code, sec. 23-273: "A. Any person, firm, association, institution of higher education, trust, corporation, or other entity ... which, without approval of the Council as provided in

> this chapter, offers or confers degrees, diplomas, certificates, programs or courses of study shall be guilty of a Class I misdemeanor. Each degree, diploma, certificate, program or course of study offered or conferred in violation of this chapter .... shall constitute a separate offense."

STATEMENT OF THE CASE

Northern Virginia Law School is the first exclusively weekend law school in the United States, giving courses only on Friday nights and Saturdays. Its three founding directors, of whom petitioner Avins is one, are all conservative Republicans. Avins is also the school's administrator and a teacher therein.

The Virginia Council of Higher Education is the state agency which regulates degree-granting institutions. In 1980, that body, then composed of members appointed by a Republican administration, authorized the school to enroll students. In 1982, the school was visited by an inspection team appointed by the Council's staff, which

found that the school maintained good quality standards and substantially met the other requirements of the State for degree status. The team recommended, and the Council conferred, degree-granting power on the school, subject to certain conditions and recommendations which were later implemented. By August 1986, as a result of the election of two successive Democratic governors, the political composition of the Council, who are gubernatorial appointees, changed. At that time, the new Council refused to extend the school's license to grant degrees, allegedly on the ground that it was not making satisfactory progress towards becoming accredited. However, the Council allowed the school to continue teaching its existing students until they obtained enough credits for the J.D. degree.

In Spring 1986, petitioner Avins , in cooperation with Citizens for Reagan, an

advocacy group of conservative Republicans, agreed to teach at Northern Virginia Law School a summer program in "conservative Law", consisting of the legislative history of the 14th Amendment, using his own book, The Reconstruction Amendments Debates (Avins ed. 1967) This book is a compilation of congressional debates and readers' guide originally written under contract with and published by the Virginia Commission on Constitutional Government, an official state agency then in existence. There is no similar compilation in existence, and the school owns the back stock, and petitioners know that no similar course is given elsewhere in the United States because no orders have been received from a school for this purpose. The course was intended for students of other law schools who lack exposure to conservative legal thinking. It was labeled "conservative" because conser-

vatives believe that schools should give courses in history.

Fliers which were mailed to law students of other schools evoked considerable interest from them, but petitioners discovered a reluctance on their part to enroll because their own law schools would not permit them to transfer credits earned for taking this course to their own schools to help satisfy the requirements for obtaining a law degree. Through considerable correspondence with students and other law schools petitioners learned that this refusal to accept such transfer credits was made because of a rule of the accreditation agency, the American Bar Association, which in all cases barred transfer credits from an unaccredited American law school, although transfer credit from foreign law schools are permitted in the discretion of the receiving law school. Due to the transfer credit problem, enrollment was insufficient

to give this course in summer of 1986.

Petitioners decided to reoffer this course during summer 1987. This time, it was decided to allow, in addition to students of other law schools, the enrollment of lawyers for advanced continuing legal education credit and also students of Northern Virginia Law School as an optional (extra or elective).

In order to open the way for enrollment of students of other law schools, petitioners wrote to defendant Council in its capacity as the policy-making body for state post-secondary institutions, including the three state (accredited) law schools, asking the Council to allow transfer credit for the summer program in conservative law for students from the state law schools, notwithstanding A.B.A. prohibitory rules. The Council did not grant this request.

On May 7, 1987, acting through the Attorney General, the Council forbade petitioners from offering this course not only to

transfer students but also to the Northern Virginia Law School students still enrolled which the school had a right to teach under its prior approval to conduct a degreeprogram. This letter representing the Council from the Assistant Attorney General threatened criminal prosecution if petitioners proceeded to offer the proposed summer course in constitutional history. As a result of the Council's threat of criminal prosecution, the law school's board of directors (Avins abstaining) voted to cancel the course to avoid criminal prosecution.

The Council's refusal to renew the school's license to grant degrees was based on the fact that the school did not hire four full-time faculty, the minimum required by Southern Association of Colleges and Schools, the regional accreditation agency. In a companion administrative proceeding, it was conceded that the quality of the current part-time faculty was good, and the students

were well satisfied with them. At the time of non-renewal, the school, which is a program of adult legal education, had a total of 23 weekend students (and four taking a few courses). The full students paid $1800 a year in tuition, so the school's revenue was manifestly insufficient to employ four full-time faculty. Moreover, such employment would have resulted in egregious economic waste, since the four teachers would be kept in total idleness all week to teach one course in Friday night or Saturday.

All federal questions were raised in petitioners' initial complaint and passed upon in the opinion of Alexandria Circuit Court. (Both annexed). They were renewed in the Petition for Appeal filed in the Virginia Supreme Court. Point I stated:

> "These counts show that the Virginia licensing statutes on their face, as plaintiffs' complaint alleges, are a violation of the privilege of freedom of speech as guaranteed by the 14th Amendment. In addition, they unduly burden interstate commerce and fail to

give full faith and credit to regulatory jurisdictions of other states, as alleged. The same unconstitutional action is found in the Council's enforcement of these statutes. Schools are an exercise of freedom of speech and the right of private schools to operate is constitutionally protected. Pierce v. Society of Sisters, 268 U.S. 510 (1925)."
Petition for Appeal, p. 4

"It is just as much a violation of the First Amendment to require a school to conform to the regulations of a private organization as it would be for the state to prohibit a newspaper from publishing unless it belonged to the American Newspapers Publishers Association. It might well enhance the quality of a magazine to require it to have full-time correspondents or reporters; a magazine on Asian affairs might well be more accurate if it hired full-time reporters for duty in Singapore, Manila, Bangkok, Hanoi, Tokyo, etc., but the First Amendment utterly prohibits any such requirement, because the First Amendment, not the state, gives the magazine the right to publish. Schools are no different. The failure of NVLS to have four full-time faculty does not present a 'clear and present danger' of bringing about any evil which Virginia has the power to prohibit, and hence the state cannot require it." Petition for Appeal, p.5

"it is clear that the Virginia licensing statutes cannot pass First Amendment muster."Petition for Appeal, p.6

POINT III of the Petition for Appeal stated:

"Count II has both anti-trust and consti-

tutional claims. A state agency is not immune under the anti-trust laws merely by virtue of being such. (cases) In order to avoid the anti-trust laws, the agency must show a 'clear articulation' of state policy. (case) Since there is nothing in the Virginia code about when transfer credits shall or shall not be accepted by state law schools, the silence of the legislature and general grant of state power is insufficient to insulate the Council from anti-trust regulation." Petition for Appeal to Supreme Ct.,p.7

The Virginia Supreme Court refused the petition for appeal because "the Court is of opinion there is no reversible error in the judgment complained of." (annexed.)

REASONS FOR GRANTING THE WRIT

I. A STATE MAY NOT MAKE IT A CRIME TO TEACH THE HISTORY OF THE UNITED STATES CONSTITUTION IN A LAW SCHOOL.

A state may only suppress speech when it is

"of such a nature as to create a clear and present danger that they will bring about the substantive evils that /it/ has a right to prevent." Schenck v. United States, 249 U.S. 47, 52 (1919).

The fact that eight students of Northern Virginia Law School and some transfer stu-

dents will learn the history of the Fourteenth Amendment is not an evil of such magnitude as to justify a state in interposing its criminal sanction to prevent it. History is a subject commonly taught in schools, and it is therefore appropriate that legal history should be taught in a law school. The history of the Fourteenth Amendment is as significant a part of American legal history as any other part, and a state cannot prohibit teaching any period of legal history because, unlike the Soviet Union, there are no "blank spots" in American history.

There is no valid reason to make it a crime to teach legal history using The Reconstruction Amendments Debates (Avins ed. 1967). This compilation contains an exact photocopy of the relevant debates from the Congressional Globes and Records of the Reconstruction era, just like a casebook reproduces judicial opinions. It has

been cited with approval by at least three Court of Appeals opinions,[1] and was produced as an official publication of the Virginia Commission on Constitutional Government, then a state agency. The fact that the political climate in Richmond has changed since this book was published cannot justify making it a crime to teach with this book. A state cannot make the orthodoxy of 1967 into the heresy of 1987, because the First Amendment recognizes neither orthodoxy nor heresy. A compilation of the legislative debates is a useful tool in teaching legislative history, and hence the state cannot show that this book lacks relevant academic value.

The only remaining ground for forbidding this course is the teacher, petitioner Avins. His acadmic credentials are part of the

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1. Dorsey v. N.A.A.C.P., 408 F.2d 1022, 1023 (5th Cir. 1969); Adickes v. S.H. Kress & Co., 409 F.2d 121, 127-8 (2d Cir. 1968); Griffin v. Breckenridge, 410 F.2d 817, 820 (5th Cir. 1969).

record. No doubt he is the most conservative Fourteenth Amendment historian in legal academic circles, but his writings are not beyond the pale of intellectual respectability, as demonstrated by the fact that he has been cited as an authority by this Court and by several Courts of Appeals.[2/] But even if petitioner is considered at the far right of the current mainstream of legal academic thought, that is no justification for making it a crime for him to teach, because the First Amendment protects the far right, the far left, and the far out equally.

The Circuit Court (with the approval of the Virginia Supreme Court) decided that "there is no violation of Avins' First Amendment rights" because the Attorney General's letter of May 7, 1987 "does not pro-

2. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 265, n. 26 (1981); Scott v. Moore, 680 F.2d 979, 993 (5th Cir. 1982); Hampton v. Hanrahan, 600 F.2d 600 (7th Cir. 1979).

hibit him from offering the course but does prohibit him from offering the course for credit either at the Northern Virginia Law School or for transfer to other schools." The fact that petitioner is still able to discuss the history of the Constitution from a soapbox or under a tree does not eliminate the First Amendment violation. Law students do not learn law from street corner soapbox speakers or from casual encounters in the park. They attend classes for credit, and if petitioner cannot teach in a law school for credit students will go elsewhere, eliminating petitioner's audience and making his First Amendment rights of little value. It is as much an infringement on freedom of speech to greatly disadvantage one speaker as against others of the same type as it is to infringe it in more traditional ways. Conservatives have equal rights to liberals in the nation's law schools.

The Fourteenth Amendment was passed with the explicit purpose of protecting the right to teach. Before the Civil War, a number of southern states made certain teaching a crime, and northern senators knew and denounced these laws. For example, Senator Wilson of Massachusetts observed:

> "In the State of Virginia, since I have held a seat on this floor, Mrs. Douglas was sent to the house of correction, or to the common jail, for teaching little children to read God's holy Word." Cong. Globe, 36th Cong. 1st Sess., p. 1685 (April 12, 1860) in The Reconstruction Amendments Debates, p. 27, col. 1 (Avins ed. 1967),(referring to Commonwealth v. Douglas 7 American State Trials 45 (Va. 1853)

In explaining the purposes of the first section of the Fourteenth Amendment, Representative John A. Bingham, the framer, said:

> "Under the Constitution as it is, not as it was, and by force of the fourteenth amendment, no State hereafter can imitate the bad example.... of Georgia and send men to the penitentiary, as did that State, for teaching the Indian to read the lessons of the New Testament, ..." Cong. Globe, 42nd Cong., 1st Sess. p. 84 (March 31, 1871) in The Reconstruction Amendments Debates, p. 510 (Avins ed. 1967).

Virginia can no longer require any teacher to follow in the illustrious footsteps of Mrs. Douglas, to jail for teaching. And teachers at the university level are as much protected by the Fourteenth Amendment as are those at the elementary level. See Keyishian v. Board of Regents, 385 U. S. 589 (1967).

Censorship of teaching is fraught with peril to First Amendment rights even when the state has an interest in maintaining minimum quality standards because a degree will be awarded for work done. Where a teacher's course may have political implications, state officials ostensibly charged with maintaining quality of teaching, if politically opposed to the teacher's viewpoint, may have a hidden political agenda, to suppress political views they disagree with by alleging that the teaching is substandard. To preserve First Amendment rights, inspections for quality in schools

not funded by the state should be made by inspectors who are not opposed to the viewpoints of the teachers therein. This will guard against negative assessments of quality which in fact mask opposition to the political views of the teachers.

In the instant case, the Council of Higher Education, a state board composed of liberal Democrats, vetoed a course to be given by a conservative Republican. No inspection for quality was made, and indeed, nowhere was it asserted by the Attorney General that the course, book, or teacher was substandard. It is logical to infer that politics played a part in the decision. Censorship of a course for political reasons is not justifiable in a degree-granting institution. This is a First Amendment violation; and a Fourteenth Amendment one.

The Virginia statute, as construed by state courts, delegates unlimited discretion to the Council to disapprove courses

without giving a reason, as it did here. Such a broad delegation impermissibly chills First Amendment rights in schools subject to the Council's jurisdiction. Keyishian, supra, p. 16. To ban a course, as it did here, the statute does not require the Council to show that the course presents a clear and present danger of creating any evil that the State of Virginia may prevent. The Council may act for reasons not justifiable on First Amendment grounds. This, in itself, is a Fourteenth Amendment violation.

Finally, the record shows that petitioner's course in Fourteenth Amendment history was initiated in cooperation with Citizens for Reagan to take advantage of the public interest generated by the publicized controversy between then Attorney General Meese and several justices of this Court about the meaning and significance of legislative history in the interpreta-

tion and application of the Fourteenth Amendment. The review process in the Virginia administrative tribunals and state courts has been so lengthy that this public interest has abated. The controversy is stale and the element of timeliness has been lost. Indeed, judicial notice may be taken that Mr. Meese is no longer Attorney General and Mr. Reagan is no longer President. This demonstrates that the Virginia statute also violates the 14th Amendment, because it fails to provide a speedy method of reviewing state censorship of courses in private law schools. Even where a state may review and license speech, a lengthy delay in the process of judicial review violates First Amendment rights as embodied in the Fourteenth Amendment. Freedman v. Maryland, 380 U.S. 51, 58-59 (1965).

Virginia's unjustified prohibition of petitioners' constitutional history course also constitutes an undue burden on inter-

state commerce. Because of its weekend format, petitioner's own students as well as transfer students come from other states than Virginia. Prohibiting this course therefore affects the flow of law students in interstate commerce without justification.

Finally, insofar as the Council prohibits transfer students from other law schools to study petitioners' course and transfer their credits to their own law school to aid them in receiving their own law degree under the authority of another state, it fails to give full faith and credit to the regulatory jurisdiction of another state. If, for example, a law school in California giving degrees under the jurisdiction of that state's regulatory authority, is willing to give credit for petitioners' history course, Virginia has no legitimate interest in prohibiting this. The degree would come under the authority of the State of California, and Virginia

should not be entitled to prohibit a California school from denying credit for the course even though it was given on Virginia soil. See New Jersey--Philadelphia v. New Jersey State Board, 654 F.2d 868, 887, note 29 (3rd Cir. 1981).

II. REFUSAL OF TRANSFER CREDIT IN ALL STATE LAW SCHOOLS VIOLATED THE 14th AMENDMENT AND ANTI-TRUST LAWS.

The Council's blanket refusal to allow the three state law schools to accept transfer credit for petitioners' course violated both the First Amendment as applied by the Fourteenth Amendment as well as the anti-trust laws. We have already noted that refusal of transfer credit eliminated the audience of transfer students from other law schools, and by thus restricting petitioners' audience, restricted freedom of speech of both teacher and students. Of course, a transferee school has a legitimate interest in insuring that the course meets

its quality standards, and American Bar Association accreditation standards explicitly provide that an accredited American law school may only allow credit for study in a law school outside of the United States if "the admitting school is satisfied that the quality of the educational program at the prior school was at least equal to that required for an approved school." Standard 308 (iii) ABA Standards for Approval of Law Schools. Here, the Council did not dispute the quality of petitioners' course, and a blanket prohibition of transferring credit is not justified on this ground.

The Council's adherence to the ABA rule which bans all transfers of credit from unaccredited American law schools also violates the anti-trust laws, 15 U.S.C. sec. 1-3. The restraint of trade has both economic and intellectual consequences. The inevitable effect of this ban is to prevent

unaccredited law schools from obtaining students from accredited law schools when the unaccredited law school is able to offer a course not available at an accredited law school, as here. Since a student at an accredited law school is never able to transfer the course credit to his own school in satisfaction of its degree requirements, he is inevitably deterred from taking that course. This restricts the flow of tuition to unaccredited law schools and thus restrains trade.

The ABA transfer ban also gives accredited law schools an intellectual monopoly. Where, as here, the conservative law course is only offered in an unaccredited law school, a student at an accredited law school cannot take it for credit, and thus is exposed only to the liberal point of view. Liberals are not entitled to a monopoly in the teaching of constitutional law or history.

The Circuit Court correctly exercised

jurisdiction over defendants to decide the anti-trust questions. Damages were not sought and the exclusive jurisdiction of federal courts to award treble damages was not involved. Cf. Nash Co. Board of Education v. Biltmore Co, 640 F.2d 484, 489, n. 11 (4th Cir. 1981). Petitioners sought a declaratory judgment, which the state court was not precluded by Congress from rendering, and the injunction requested was ancillary to that. Whatever the jurisdiction over private parties, the requirements of federalism would require that a state court should be allowed to insure that state agencies do not transgress legal rules and thus create potential treble damage liability in federal court.

However, the Circuit Court erroneously held the Council immune under the "state action" exception. In order to avoid the anti-trust laws, the state agency must show a "clear articulation" of state policy.

Community Communications Co. v. Boulder, 455 U.S. 40, 43 (1982). A state agency is exempt only if there is a

> "state policy to displace competition with regulation or monopoly public service." Town of Mallie v. Eau Claire, 471 U.S. 34, 39((1985).

There is no legislative policy governing transfer of credits from a private to a state law school; the Virginia Code is silent on this. Hence the Council is not exempt or immune from anti-trust laws.

III. TERMINATION OF DEGREE AUTHORITY BECAUSE OF LACK OF FOUR FULL-TIME TEACHERS WAS UNCONSTITUTIONAL.

Schools are an exercise of freedom of speech and the right of private schools to operate is constitutionally protected. Pierce v. Society of Sisters, 268 U.S. 510 (1925). Regulation of degree-status of a school has been justified

> "in protecting both the consumers of education and the public which may rely upon the certification of proficiency implicit in the award of a degree."

New Jersey--Philadelphia v. New Jersey State Bd., 654 F.2d 868, 887 (3rd Cir. 1981). That is irrelevant here. In the administrative hearing, the Council did not dispute the school's evidence that its teaching was standard and conceded that the school met state educational quality standards. Cases involving "diploma mills" or substandard schools are not in point.

The requirement that a purely weekend school should hire four teachers to sit in total idleness all week is purely arbitrary. Moreover, it is unconstitutional. By analogy, it might well enhance the quality of a magazine or newspaper to require it to hire a set number of full-time reporters or writers, but the First Amendment prohibits any such requirement because the First Amendment, not the state, gives it the right to publish. Schools are no different. The failure of N.V.L.S. to have four full-time faculty does not present a "clear and pre-

sent danger" of bringing about any evil which Virginia can prohibit, so the state cannot require it.

The fact that the full-time faculty requirement was imposed by Southern Association, the regional accreditation agency, rather than by the Council directly, does not change the constitutional rule. The letter of March 10, 1988 from U.S. Assistant Secretary for Postsecondary Education C. Ronald Kimberling states that the United States Department of Education

> "does not currently evaluate in any detail the substantive educational or training standards used by accrediting agencies to assess educational quality or achievement." (page 9, in record).

Specifically referring to the full-time faculty requirement of Southern, he said:

> "The Department of Education makes no determination that adherence to either of these standards is essential to a program of minimum educational quality....." (page 12, in record)

Therefore, Virginia cannot rely on any federal determination that adherence to ac-

creditation standards is necessary to insure minimum educational quality.

While accreditation agencies are private organizations, since the Council required the school to conform to its rules, as a condition of retaining its license, those rules are "state action" for 14th Amendment purposes. Terry v. Adams, 345 U.S. 461 (1953). Since the Attorney General through her assistant also cooperated in enforcing the unconstitutional statute, petitioners were entitled to make her a party to enjoin her from doing so. Ex Parte Young, 209 U.S. 123 (1908); Scheuer v. Rhodes, 416 U.S. 232, 237 (1974).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ALFRED AVINS
Attorney for Northern Virginia Law School and
Petitioner pro se

January 21, 1989

COUNT I: PETITION OF COMPLAINT

1. Plaintiff Northern Virginia Law School Inc. is a Virginia corporation located in Alexandria and engaged in a program of part-time, weekend legal education.

2. Plaintiff Avins is a faculty member and administrator of and one of the directors of, Northern Virginia Law School.

3. Plaintiff Avins and the other directors of Northern Virginia Law School are conservative Republicans.

4. The Virginia Council of Higher Education is the regulatory agency for degree-granting schools in Virginia pursuant to Virginia Code sec. 23-267, and defendants above-named were its members during the relevant period alleged herein, and acted under color of state law as alleged herein.

5. Defendants are liberal Democrats appointed by Democratic Governors Robb and Balilies, and acted as individuals using

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their state positions under color of law, and plaintiffs incorporate by reference the whole record, both administrative and materials filed in this Court, in CH 87-18065, herein, as if set forth in extensio here.

6. Plaintiff school was granted provisional degree-granting authority in 1982 by then Council of Higher Educatior members who had been appointed during a Republican state administration.

7. In 1986, The Council, after its change in political composition, as above stated, declined to renew the license of Northern Virginia Law School to grant degrees, on the alleged ground that it was not making satisfactory progress towards accreditation, but permitted the school to continue teaching its students then enrolled under its existing license.

8. In Spring 1987, plaintiff Avins proposed to offer at plaintiff school for a summer session a second course in "conser-

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vative law" consisting of the legislative history of the 14th Amendment to the United States Constitution, using his own book, The Reconstruction Amendments Debates. This course was to be an optional for the Northern Virginia Law School students, who would receive credit for its degree, and attendance of students of other schools or bar members would be certified to that school or a continuing legal education program so that credit could be awarded if the other school or bar program so desired. This course is not given in any other school in the United States.

9. On May 7, 1987, acting through the Attorney General, defendants forbade plaintiffs from offering said course, and threatened them with criminal prosecution if plaintiffs offered this course.

10. As a result of this threat, said course was cancelled by decision of the other directors of Northern Virginia Law

School.

11. The action of defendants interfered with the contractsand prospective contracts of plaintiffs, causing plaintiff Avins to lose a teaching fee of $500 and the school to lose $1600 in tuition for said course.

12. In prohibiting plaintiffs from offering this course defendants refused to inspect either this course or examine the qualifications of plaintiff Avins to give it, and did not arrange a decision by any inspector not politically opposed to said course.

13. Plaintiff Avins meets the generally accepted qualifications for law school teachers and is qualified to give this course, which meets generally accepted standards for courses bearing credit in law schools throughout the United States.

14. The action of defendants violated 42 U.S.C. sec. 1983 because Virginia Code, sec. 23-267 to 23-273, under color of which

they acted, is unconstitutional as applied to plaintiffs in this matter since it (a) violates the 14th Amendment (1st Amendment); (b) places an undue burden on Interstate Commerce in violating the rights of the school and its students and plaintiff Avins who both travel in interstate commerce; and (c) insofar as it prohibits transferring credit fails to give Full Faith and Credit to the regulatory jurisdiction of other states over their degree-granting schools.

WHEREFORE, on this count plaintiffs demand: (a) A declaratory judgment that defendants' acts were unconstitutional; and (b) An injunction prohibiting defendants from interfering with plaintiffs' teaching and curriculum; and (c) Damages for Avins of $500 and for Northern Virginia Law School of $1600.

COUNT II.

15. Repeats paragraphs 1-13.

16. The Council is the supervisory authority which sets policy for state post-secondary institutions, pursuant to Virginia Code sec. 23-9:6:1, including the three state law schools (University of Virginia, William & Mary, and George Mason).

17. Virginia state law schools will not accept transfer credit from Northern Virginia Law School, and as a result, students of those law schools are deterred from taking the summer course in conservative law since they cannot transfer credit from such course to their own schools to count towards degree credit at their own law schools.

18. No course comparable to the summer program in conservative law is offered in any state law school, so the lack of ability to transfer credit deprives Northern Virginia Law School of the opportunity of attracting visiting students from state law schools and deprives credit-seeking law students from these schools of the ability to

take this course anywhere in the state for credit towards their degree.

19. The refusal of the state law schools to accept transfer credit is based on rules of the American Bar Association, the accrediting agency, which prohibits transfer of credit from a non-accredited law school to an A.B.A.-accredited law school.

20. On June 6, 1987, plaintiffs applied to defendants to have said transfer credit granted at state law schools, in time for the summer course of 1987, but defendants, by ignoring said application, denied it.

21. Such A.B.A. rules prohibiting credit transfer constitute an unlawful combination in restraint of trade in violation of 15 U.S.C. sec. 1-3 and violate the 14th Amendment (1st Amendment) rights of plaintiffs and transfer students, and defendants' actions in enforcing said rules also have this effect.

WHEREFORE, plaintiffs demand a declaratory judgment that transfer credit shall be granted and an injunction restraining defendants from refusing transfer credit at state law schools of the summer program in conservative law.

COUNT III.

22. Repeats paragraphs 1-7.

23. The actions of defendants in refusing to renew plaintiff law school's license were contrary to Virginia statute in that said Council failed to demonstrate by clear and convincing evidence that plaintiff law school was no longer meeting minimum state standards for institutional operation as required by Virginia Code sec. 23-271.c.1.

24. Defendants' "stipulation" that plaintiff school should progress towards accreditation as a condition of retaining its license to grant degrees is contrary to Virginia Code, sec. 23- 268,269, which

requires defendants to grant provisional approval to schools which maintain minimum standards.

25. Insofar as the Virginia Code permits only the operation of accredited schools it violates the 14th Amendment (1st Amendment) and is also procedurally unconstitutional in failing to afford an expeditious determination of whether a school meets standards for licensure.

26. The actions of defendants occurred after plaintiffs had proposed to offer a first "conservative summer law program" and after alumni and students of plaintiff school had petitioned the legislature for bar examination privileges, which defendants opposed, and the action of defendants in terminating the license to grant degrees violated the rights of speech and petition guaranteed by the 14th Amendment.

WHEREFORE, plaintiff school demands a

declaratory judgment and injunction requiring the defendants to continue its provisional approval.

ALFRED AVINS
Plaintiff pro se &
counsel to the school
P.O. Box 2532
Washington, D.C. 20013
(202) 667-1414

WILLIAM EVANS
Attorney for
Plaintiff school
c/o Northern Virginia Law School
4105 Duke St.
Alexandria, Va. 22304
667-1414

March 29, 1988

COMMONWEALTH OF VIRGINIA: CIRCUIT COURT OF ALEXANDRIA

Re: Avins et al v. Virginia Council of Higher Education et al, Chancery No. 18065

Letter Opinion of Judge Alfred D. Swersky
February 26, 1988

This matter is before the Court on Defendants' Demurrers to the four count "Petition of Complaint".

The cause of action alleged against the Attorney General of Virginia (Terry) and the Virginia Council of Higher Education (Council) arises out of action taken by the Council when it "declined to renew the license of the Northern Virginia Law School" (para. 7, Petition). Further, the Petition alleges that Terry threatened criminal prosecution if Complainant Avins offered a course in "conservative law" for credit (para. 8, Petition).

From these actions comes a " Petition of Complaint" alleging that the actions of Defendants were unconstitutional and re-

questing an injunction and damages under Title 42, U.S.C. § 1983; that the actions of the Council constitute an unreasonable restraint of trade in violation of certain anti-trust statutes (Title 15, U.S.C. §§ 1-3); that the actions of the council were contrary to the Virginia statutes setting standards for institutional operation (Title 23, Code of Virginia, § 268, et seq.); and appealing the actions of the Council.

Defendant Terry, named only in Count One, demurs on the grounds that the Petition fails to allege her personal involvement in the claimed violation of Title 42, U.S.C. § 1983. The Demurrer must be sustained.

The only allegations of her personal involvement are found in paragraphs 5 and 9 of the Petition. Terry is alleged to be "a liberal Democrat" and to have act-

ed through an Assistant Attorney General to enforce the mandates of the Defendant Council. Further, it is alleged that, acting on behalf of the Council, she "forbade Plaintiffs from offering said course (Conservative Law) and threatened them with criminal prosecution..." Such allegations are insufficient as a matter of law to impose personal liability on Defendant Terry, It is clear that the doctrine of Respondeat Superior does not apply to actions under Section 1983 and no facts of Terry's personal involvement are alleged. Vinnedge v. Gibbs, 550 F. 2d 926 (4th Cir. 1977). Since no other facts as to Terry's involvement can be alleged, the Complaint will be dismissed as to her and Plaintiff's objections to this ruling will be noted.

The Demurrers of Defendant Council to Counts One, Two, and Three will be sustained for the following reasons.

Count One alleges a violation of Title 42, U.S.C. § 1983 by the Council. The Council is not a person within the meaning of § 1983 and, despite Plaintiff's arguments to the contrary, the individual members of the Council are not named as Defendants in this cause. Further, there are no facts alleged from which the Court could find or even reasonably infer that a violation of Plaintiffs' constitutional rights has occurred. With respect to the failure to renew the provisional license of the school no allegation is made that the Council nor any member acted illegally, unlawfully, or unconstitutionally in arriving at the decision not to renew. With respect to the allegations concerning the conservative law course, no allegation is made that the Council acted beyond the scope of its duties. In fact, the letter of the Assistant Attorney General of May 7, 1987,

does not prohibit Avins from offering the course but does prohibit him from offering the course for credit either at the Northern Virginia Law School or for transfer to other schools. From this, there is no violation of Avin's First Amendment rights. See, Shelton College v. State Board of Education, 226 A.2d 612 (New Jersey,1967).

Count Two alleges that the actions of the Council constitute violations of the anti-trust laws found in Title 15 U.S.C. § § 1-3 in that they prohibit the transfer of credits from the Plaintiff school to others. Plaintiff alleges that the rules of the American Bar Association, (ABA), the basis for the refusal to accept transfer credits, constitute a violation of the anti-trust laws as well as violations of Plaintiffs' First Amendment rights. Council demurs to Count Two, relying on immunity from anti-trust actions under the "State Action Doctrine" as set down in Par-

ker v. Brown, 317 U.S. 350 (1942). Plaintiffs argue that under Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), they are entitled to a trial on the merits of Count Two.

However, nothing could more clearly be state action than the education of a state's citizen. Even without the clearly enunciated state policy as set forth in Title 23, Code of Virginia, § § 265, et seq., there could be no doubt that education, even higher education, and its regulation is a matter of direct state action by the legislature. Therefore, the Demurrer to Count Two will be sustained and that Count dismissed, The objections of the Plaintiffs are noted.

Count Three alleges that the Councils' actions were "contrary to Virginia Statute" in that there was no demonstration that Plaintiffs' school was "no longer meeting

minimum state standards for institutional operation (para. 23, Petition) and that under Virginia's statutory scheme the Council could not require "progress toward accreditation as a condition of retaining its license (para. 24, Petition). Also it is alleged that the statutory scheme is unconstitutional for its failure to afford " an expeditious determination of whether a school meets standards for licensure (sic)" (para. 25, Petition).

Plaintiff argues that under Title 23, Code of Virginia, § 269, the Council could not grant a provisional approval and impose both a time limit and conditions of it its being granted. Plaintiff relies on the wording of the statute which states in pertinent part

> ...the Council may establish the term or period of time for which such approval is granted or may specify certain conditions under which it is granted. Va. Code Ann. § 23-269B)(Emphasis added.)

Therefore, Plaintiff concludes that the Council could not impose as a condition the making of satisfactory progress toward accreditation and set a time limit for the expiration of the provisional approval.

Further, Plaintiff argues that the only condition that can lawfully be imposed is the meeting of "minimum standards" as set forth in Section 23-268 of the Code which reads in pertinent part

> The Regulations [adopted by the Council] ... shall contain standards designed (1) to insure that all institutions of higher education which are subject to the provisions of this chapter meet minimal academic standards.

In April of 1982, according to the record of this case, Plaintiff school was granted approval to confer the Juris Doctor degree provided that it seek accreditation as set forth in the statute (§ 23-269) from the ABA

or other approved accrediting body.

Further, Council conditioned any extension of the time of the provisional approval only upon a showing that the school had "reasonable prospects of gaining full accreditation during the period covered by such extentions." (See, letter of Council, April 8, 1982). Thus, the Council did not impose conditions under which approval was granted but set conditions under which the time could be extended, i.e., the making of satisfactory progress toward accreditation. (See, letters of Council, April 5, 1984; May 2, 1985). The condition that the institution receive accreditation by the ABA or other approved body is statutory and was not imposed by the Council. It is imposed by the law. The school would have had to seek this accreditation even if the Council did not specify it in its approval. Clearly under the statutory scheme and the regulations of the Council it could impose conditions for

extending the time of its provisional approval and there is nothing inappropriate in requiring satisfactory progress toward statutorily-mandated accreditation. Further, it should be noted that there is no allegation that the limitation Plaintiffs argue exists in the statute was ever called to the attention of the Council; that is, no objection was ever made to the Council that it could not impose such conditions.

Plaintiffs' reading of Section 23-270, hardly makes sense. Under its reading of the statute the Council could have only fixed the time for which provisional approval was granted and not extended it. At the conclusion of that time, if the institution had not obtained the requisite accreditation the provisional approval would expire. Plaintiff, having availed itself of the extentions of time because of its assertion that it was making progress, is hardly in a position to complain that the Council

exceeded its authority.

Plaintiff's argument that minimal academic standards require something less than the Council mandates must likewise fail. The Regulations adopted by the Council pursuant to the legislative direction (§ 23-268) clearly set forth "minimal academic standards" to be maintained for provisional approval. See, Regulations Governing Approval of Certain Institutions to Confer Degrees, Diplomas and Certificates, July 1, 1980, Standards for Institutional Approval.

The Demurrer to Count Three must be sustained and this Count Dismissed. The objections of Plaintiffs should be noted.

Count Four presents an appeal of Council's actions under Section 9-6.14:16 of the Code of Virginia and, hence, is not subject to Demurrer. Defendant Council has filed what it considers to be the administrative record in this matter pursuant to Section 9-6.14:17 and Plaintiffs have objected to its lack of

completeness. If counsel can not agree on the contents of the record the statute permits the supplementation of the record and, if necessary, a hearing can be held on those items to which objections are made.

Mr. Kast should prepare an appropriate Decree in accordance with the rulings of the Court.

VIRGINIA:
IN THE CIRCUIT COURT OF THE CITY OF ALEXANDRIA

Alfred Avins & Northern Virginia Law School, Inc.,
v.
Virginia Council of Higher Education, et al.,
and
Stanley E. Harrison, et al.,
Chancery No.'s 18065 and 18406

FINAL DECREE

In the foregoing consolidated case, upon the pleadings, exhibits, and briefs filed, together with the administrative record with affidavits and exhibits annexed, the Court:

(1) Sustains, without leave to amend, the demurrers filed by defendants in response to Counts I, II, and III of Chancery No. 18406, for the reasons set forth in its letter

opinion of February 26, 1988.

(2) Pursuant to Virginia Code S 9-6.14:19, remands this matter to the State Council of Higher Education for the limited purpose of the Council articulating the objective basis it used for determining that the Northern Virginia Law School failed to make satisfactory progress toward accreditation. The Council shall take further evidence on this issue and articulate that objective basis in writing, and notify the plaintiffs thereof.

(3) Dismisses all remaining allegations raised by plaintiffs in this consolidated case.

(4) Denies plaintiffs' motion to restore the authority of the Northern Virginia Law School to grant the J.D. degree pending the outcome of this litigation.

And it is according so ADJUDGED, ORDERED AND DECREED this 11th day of August, 1988,

and this matter is dismissed and stricken from the Court's docket. The clerk shall, upon entry, provide copies of this Final Decree to counsel of record.

SUPREME COURT OF VIRGINIA: November 22, 1988

Alfred Avins, et al, Appellants,

-against-

Virginia Council of Higher Education etc., et al., Appellees.

Record No. 880939: Circuit Court Nos. C-18065 and C-18406

From the Circuit Court of the City of Alexandria

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal and denies the appellant's motion for certification.

Supreme Court, U.S.
FILED
FEB 22 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

NO. 88-1204

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ALFRED AVINS, NORTHERN VIRGINIA LAW SCHOOL,
Petitioners,

v.

STATE COUNCIL OF HIGHER EDUCATION FOR VIRGINIA, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the State Council of Higher Education for Virginia abuse its discretion or act outside the scope of its statutory authority when it declined to grant the Northern Virginia Law School an additional period of limited provisional approval, beyond the nearly four and one-half years previously granted, to confer the Juris Doctor degree in Virginia?

LIST OF PARTIES

The petitioners in this Court and the appellants below: Alfred Avins and Northern Virginia Law School. The respondents in this Court, and appellees below: the State Council of Higher Education for Virginia, and the individual members of the Council, Stanley E. Harrison, Joan S. Jones, William C. Battle, Robert L. Burrus, Jr., Whittington W. Clement, Bernard J. Haggarty, Ruby G. Martin, Hugh L. Patterson, Abe J. Spero, William B. Spong, Jr., and Stephen J. Wright. Also an appellee below: Attorney General of Virginia Mary Sue Terry.

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IN THE

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OCTOBER TERM, 1988

NO. 88-1204

ALFRED AVINS, NORTHERN VIRGINIA LAW SCHOOL,
Petitioners,

v.

STATE COUNCIL OF HIGHER EDUCATION FOR VIRGINIA, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The State Council of Higher Education for Virginia ("the Council") is a permanent collegial body within the executive branch of Virginia state government. Va. Code § 2.1-1.7. By statute it is empowered to regulate, *inter alia*, the conferral of degrees by institutions of higher education in Virginia. Va. Code § 23-267. Pursuant thereto, on April 7, 1982, the Council initially granted the Northern Virginia Law School ("NVLS") limited provisional approval to confer the J.D. degree for a period ending April 30, 1984. This provisional approval was explicitly contingent upon NVLS making "satisfactory progress" toward receiving accreditation from a recognized accrediting body on or before April 30, 1984. (Appendix 1, pp. 1a-1d.) Twice, at the request of NVLS, the Council extended NVLS's period of limited provisional approval: first on April 4, 1984, then on May 1, 1985. Each such extension was expressly contingent upon NVLS making "satisfactory progress" toward accreditation.

On June 4, 1986, the Council responded to NVLS's request for yet another extension of limited provisional approval by deferring action in order to allow NVLS to obtain a decision on its current accreditation

request then before the Southern Association of Colleges and Schools ("SACS").[1] On June 24, 1986, SACS denied NVLS's request that it appoint a candidate committee to visit the school, a necessary first step to accreditation by SACS. This was the fifth such denial in three years by SACS. On August 6, 1986, the Council denied NVLS's request for a further period of provisional approval because NVLS had failed to comply with the Council's directive "that the institution make satisfactory progress toward achieving full accreditation from an accrediting body recognized by the U.S. Department of Education and which this Council finds to be an appropriate body." (Appendix 2, pp. 1e-1f.)

NVLS sought and obtained an administrative hearing on the Council's decision pursuant to Va. Code § 9-6.14:12. The hearing resulted in the final decision of the Council which is attached. (Appendix 3, pp. 1g-1h.) NVLS then filed suit in the Circuit Court of the City of Alexandria alleging imperfections in the administrative procedure and, for the first time, constitutional violations. The constitutional arguments first made at this point included allegations of political motivations of the Council members and the Attorney General of Virginia, all of whom were alleged to be "liberal democrats." No facts supporting these allegations of political motivation was, or ever has been, presented by NVLS or Avins. The Circuit Court of Alexandria dismissed NVLS's constitutional claims on August 11, 1988, and on the same date remanded to the Council the issue of whether the Council had allowed NVLS reasonable time to become accredited. On August 18, 1988, the Council took further evidence and reaffirmed its earlier decision following a review of the time allowed other institutions to become accredited. (Appendix 4, pp. 1i-1o.)

Following the circuit court's decision, Avins and NVLS filed concurrent appeals in the Virginia Court of Appeals and the Supreme Court of Virginia[2] and, while these appeals were pending, filed suit in the United States District Court in Alexandria raising the same issues previously raised in the Circuit Court of Alexandria and on appeal to Virginia's two appellate courts. The district court dismissed NVLS's suit on abstention grounds, and NVLS appealed this decision to the

---

[1] NVLS chose to apply exclusively to SACS for accreditation even though the American Bar Association is generally looked to for such accreditation decisions, and even though graduates of non-ABA-accredited law schools are not eligible to sit for the bar examination in Virginia. The choice of an accrediting body was NVLS's alone.

[2] The Virginia Court of Appeals has jurisdiction over appeals from administrative agencies. Va. Code § 17-116.05(1). The Supreme Court of Virginia has jurisdiction over claims involving the constitutionality of Virginia statutes. NVLS and Avins chose to file concurrent appeals, raising all issues, in each court.

United States Court of Appeals for the Fourth Circuit, where it is presently pending.

On November 22, 1988, the Supreme Court of Virginia denied NVLS's petition for appeal. On January 23, 1989, NVLS filed its petition for writ of certiorari in this Court. As of this date appeals raising the identical issues that NVLS seeks to have this Court hear are pending in the Virginia Court of Appeals and the Fourth Circuit.

REASONS FOR DENYING WRIT

Review on writ of certiorari "will be granted only when there are special and important reasons therefor." Rule 17, Rules of United States Supreme Court. There are no such reasons here. Also, with two appeals currently pending, one each in the federal and state court systems, this case is premature for hearing by this Court even if it did raise substantial constitutional questions.

On the merits, throughout this litigation NVLS and Avins have repeatedly attempted to characterize this as a First Amendment case. It is not. Rather it is a straighforward case of legitimate governmental regulation. The Council has not told NVLS what it can or cannot teach, nor has it told Avins what he can or cannot say. Instead, following more than ample time for NVLS to gain requisite accreditation by any recognized accrediting body, the Council has responsibly declined to allow NVLS to continue conferring the J.D. degree while seeking that accreditation. While structuring its decision to allow reasonable provision for students in attendance, the Council has decided that NVLS should "get its house in order" first, and *then* reapply for authority to confer the J.D. degree. (Appendix 2, pp. 1e-1f.)

NVLS contends that this regulatory action by the Council is repugnant to the First Amendment. Such an argument, logically extended, must be that everyone has the absolute, unregulated power to bestow degrees evidencing higher educational achievement. This obviously makes a farce of any rational scheme of regulation of the conferral of academic degrees. *Shelton College v. State Board of Education*, 48 N.J. 501, 509, 266 A.2d 612, 616 (1967). *See also, New Jersey State Board of Education v. Board of Directors of Shelton College*, 90 N.J. 470, 448 A.2d 988 (1982); *State ex rel. McLemore v. Clarksville School of Theology*, 636 S.W.2d 706 (Tenn. 1982). For the Council to have permitted NVLS additional time to confer degrees would have been irresponsible given the action of SACS in declining even to review the institution for

accreditation, and the absence of any positive step toward accreditation over more than four years.

Not only did the Council's actions in this case not infringe the First Amendment rights of NVLS and Avins, those actions were totally consistent with the Council's statutory powers. Those powers include the authority to approve the conferral of certain degrees by institutions of higher education in Virginia. Va. Code § 23-267. They also include the authority to "grant provisional approval to an institution to confer degrees at a specified level or in specified program areas at a particular degree level." Va. Code § 23-269B. Only "when the institution has obtained accreditation from an appropriate regional or professtional accrediting organization," may the Council grant full approval to confer degrees. *Id.* Conversely, where, as here, the Council has estblished the period for which approval has been granted and specified conditions under which it is granted, failure to meet the specified conditions before the period of provisional approval expires automatically results in the termination of the provisional approval. This is all that happened here.

A second reason why this Court should deny a writ in this case is because the identical issues that this Court is being asked to address are currently pending before the Fourth Circuit Court of Appeals, and the Virginia Court of Appeals. While this Court may, in extraordinary circumstances, choose to hear a case under these circumstances,[3] no such circumstances exist here.

---

[3] 28 U.S.C. § 2101(e) states that an application for a writ to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment. But a writ will be granted in such circumstances "only upon a showing that the case is of such imperative public importance to justify the deviation from normal appellate practice and to require immediate settlement in this Court." Rule 18, Rules of U.S. Supreme Court.

CONCLUSION

Because the Councils's actions were explicitly authorized by Virginia law and did not contravene the First or Fourteenth Amendments of the United States Constitution, and further because the issues raised are now pending before two lower appellate courts, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

RESPONDENTS'
APPENDIX
1

April 8, 1982

Dr. Alfred Avins
Acting Dean
Northern Virginia Law School
P. O. Box 1343
Alexandria, Virginia 22313

Dear Dr. Avins:

I am pleased to inform you that the Council of Higher Education took the following action at its April 7, 1982 meeting:

> RESOLVED: The State Council of Higher Education grants Northern Virginia Law School provisional approval to confer the Juris Doctor Degree for a period of two years, ending April 30, 1984, with the following stipulations:
>
> 1. That the institution initiate the following actions in order to comply completely with the Council's standards for institutional approval:
>
> (a) Establish and publish its criteria for, and schedule of, refunds of tuition and fees.
>
> (b) Review each current student's record to ensure that it contains, at a minimum, a complete application for admission, an official report of the student's score on the LSAT, a current transcript of the student's academic progress, and the student's current address and telephone number.
>
> (c) Develop immediately and implement a records management plan that provides for the more efficient maintenance, retrieval, and periodic purging of student records.

(d) Implement *immediately* a plan for curriculum development and evaluation so as to ensure that the core faculty are actively involved in this function.

(e) At the beginning of each term, give each student a written schedule of times when each instructor may be contacted either in person or by telephone for academc advising.

(f) Develop and implement a process which provides for periodic review of the institution's financial condition by the Board of Directors, so as to ensure sound business and financial management.

(g) Obtain an independent audit of its financial records for Fiscal Year 1982, and request a management letter based on the audit.

(h) Establish *immediately* and maintain a system of personnel records which includes, at a minimum, certified transcripts or official indicia of award of the highest academic credential held by each instructional faculty member.

(i) Develop *immediately* a plan for the continuous acquisition of supplements and update volumes for its serial sets and reporter series, and include funds in future budgets for their acquisition.

(j) Consolidate the library materials now in storage with the basic collection now available on site within one year after either expanding its rented quarters or acquiring a permanent facility.

(k) Add a professional law librarian to the staff by the time that the stored collections are consolidated on site.

(l) Execute a contract or other formal agreement between the Board of Directors and the owner of the library materials now used by the institution, so that the institution is assured of control of the library materials for a specified period of time.

(m) Amend and expand its facilities plan to tie future incremental increases in enrollments to the orderly expansion or replacement of its current quarters, so that the institution's facility contains adequate space.

2. That the institution actively seek accreditation from the American Bar Association or other accrediting body recognized by the U. S. Department of Education or its predecessor agency as the institution may choose.

3. That the period of provisional approval extend for two years, to April 30, 1984, during which time Northern Virginia Law School must make satisfactory progress towards being granted Candidacy Status by a recognized accrediting agency as stated above, and any extensions of provisional approval after that date may be granted only if the institution has reasonable prospects of gaining full accreditation during the period covered by such extensions.

In granting provisional approval to Northern Virginia Law School, subject to these stipulations, the Council noted that the report of its Site Visit Committee contains other recommendations that merit consideration by the institution.

Please note that the first stipulation requires several actions which must be implemented immediately. When these actions are

completed, please notify Dr. John E. Molnar of the Council staff. He will also be contacting you from time to time during the period of provisional approval to ascertain the institution's progress towards achieving accreditation as required by the second stipulation.

If the Council staff can be of assistance at any time, I hope that you will not hesitate to call upon us.

Sincerely,

/s/ Gordon K. Davies
Director

GKD/bct

RESPONDENTS'
APPENDIX
2

August 6, 1986

Dr. Alfred Avins
Acting Dean
Northern Virginia Law School
P. O. Box 2532
Washington, DC 20013

Dear Dr. Avins:

At its meeting today, the Council of Higher Education took the following action:

> RESOLVED: The Council of Higher Education denies the request of Northern Virginia Law School for an extension of limited provisional approval to confer the Juris Doctor (J. D.) degree for failure to comply with the stipulation in the Council's approval resolutions of April 7, 1982, April 5, 1984, and May 1, 1985, that the instituion make satisfactory progress towards achieving full accreditation from an accrediting body recognized by the U. S. Department of Education, and which this Council finds to be an appropriate accrediting body.
>
> The Council hereby authorizes Northern Virginia Law School to offer the courses necessary to enable students who were enrolled prior to June 1, 1986, to complete the requirements for the Juris Doctor degree and to award the Juris Doctor degree to those students who satisfactorily complete the program, subject to the following stipulations:
>
> 1. the institution must provide a written commitment to the Council that it will continue to provide at least the current level of faculty and resources to support the courses;
>
> 2. the institution must agree to assist students who wish to transfer to other institutions;

3. the institution will not enroll any new students in the degree courses; and

4. for this authorization to become effective, the institution must agree, in writing, to the stipulations noted above by August 22, 1986.

Given the Council's action, Northern Virginia Law School presently lacks authority to confer the Juris Doctor degree and cannot offer courses or programs for degree credit.

Section 23-271 of the Council's regulations provides an opportunity for the institution to appeal the Council's action. If Northern Virginia Law School wishes to make either an informal appeal to the Council in accordance with Section 9-6.14:11 of the *Code of Virginia* or a formal appeal before a hearing officer in accordance with Section 9-6.14:12 of the *Code*, I ask that you so notify me in writing within ten days of receipt of this letter as required by Section 23-271.B.1. of the Council's regulations.

Sincerely,

/s/ Gordon K. Davies

RESPONDENTS'
APPENDIX
3

RE: Northern Virginia Law School

Resolved: The State Council of Higher Education for Virginia, having received and reviewed the report of the hearing officer, dated July 31, 1987, on the formal appeal of Northern Virginia Law School from the resolution of the Council on August 6, 1986, such appeal being heard by the hearing officer in proceedings conducted February 27, 1987, in accordance with Section 23-271.B of the Council's Regulations Governing the approval of Certain Institutions to Confer Degrees, Diplomas and Certificates (adopted July 1, 1980), determines that it is in the public interest not to accept the recommendation of the hearing officer to grant an additional extension of provisional approval to the instituion to confer the Juris Doctor (J. D.) degree in the Commonwealth. Accordingly, the resolution of the Council of Higher Education August 6, 1986, is affirmed.

On the basis of the record, the Council finds and so determines that: the institution has been on notice since at least October 1980 that it must gain requisite accreditation with an accrediting body recognized by the United States Department of Education; the Council, in accordance with subsection B of Section 23-269 of the Code of Virginia and Section 23-269.B.3, of its 1980 regulations, stipulated in its initial grant of provisional approval dated April 7, 1982, and in subsequent extensions of provisional approval dated April 5, 1984, and May 1, 1985, that the institution must make satisfactory progress toward gaining accreditation with a recognized accrediting body; and the institution has not obtained requisite accreditation from any recognized accrediting body, notwithstanding two extensions of provisional approval from the Council to assist it in this regard. The Council accordingly determines that the institution already has been granted more than reasonable time and opportunity to gain accreditation.

The Council also determines that the record fails to establish that the institution has taken reasonable and timely steps to gain the requisite accreditation. In addition, the institution has not presented to the Council adequate evidence that its appointment of a full-time faculty member, as established in its letter of May 16, 1987, attached to the hearing officer's report, satisfies the criteria for appointing a Candidate Committee

or that the institution has the minimum four full-time faculty appointments required for the accreditation of a graduate-level institution.

The Council authorizes the institution to offer the courses necessary to enable students who were enrolled prior to June 1, 1986, to complete the requirements for the Juris Doctor degree and to award the degree to those who complete the program, provided the institution complies with the three stipulations set forth in the said August 6, 1986, resolution of the Council.

The foregoing constitutes the final action of the Council on this appeal in accordance with Section 23-271.B. of the 1980 approval regulations. This action shall not prejudice the institution if it chooses to file a new application for approval to confer degrees in accordance with Council regulations applicable at the time of such filing.

RESPONDENTS' APPENDIX 4

STATE COUNCIL OF HIGHER EDUCATION FOR VIRGINIA RESOLUTION REGARDING THE NORTHERN VIRGINIA LAW SCHOOL

Whereas, by memorandum opinion dated July 14, 1988, the Circuit Court of the City of Alexandria has remanded to the Council the administrative appeal of the Northern Virginia Law School, and has limited that remand to one issue: articulation by the Council of the objective basis for its final determination of October 20, 1987 that Northern Virginia Law School failed to make satisfactory progress to becoming accredited; and

Whereas, the Council hereby respectfully responds to the Court's remand in articulating the basis for its final determination. The Council maintains that said determination was not capricious, but was reasonably based upon, and consistent with, like treatment accorded all similarly situated institutions since July 1, 1970, the date the Council was authorized by the General Assembly to approve the conferral of degrees by private institutions of higher education in Virginia; and

Whereas, the Council has reviewed its actions relating to the approval of the conferring of degrees for the period specified above and noted the following:

(1) Since July 1, 1970, the Council has granted provisional approval to confer degrees for the first time to fifteen private institutions, which includes Northern Virginia Law School (see attached table). Eleven of these gained Candidate for Accreditation status in less than five years (60 months) after receiving provisional approval. None of these institutions, from the grant of candidacy status, took longer than five years to obtain full accreditation. Moreover, during their period of provisional approval, none were denied candidacy status or were declined review by the accreditating body for failure to meet its standards.

(2) With respect to the remaining four institutions:

(a) The National Graduate University's provisional approval to confer degrees was revoked after twenty-four months by the Council following a denial of Candidate for Accreditation status by the Southern Association of Colleges and Schools (SACS).

(b) The provisional approval (58 months) of Notre Dame Apostolic Catechetical Institute expired without further extension by the

Council. During its provisional approval, the institution was actively satisfying SACS' critria for accreditation; there was no denial by the accrediting body to appoint a candidate committee to review accreditation eligibility. Unlike the Northern Virginia Law School, Notre Dame Apostolic Catechetical Institute reapplied for provisional approval under the Council's current regulations. Upon this application and determination of its meeting all of the Council's criteria under the new regulations, Notre Dame Apostolic Catechetical Institute was granted a new three-year term of provisional approval during which it must obtain Candidate for Accreditation status. In June 1988, SACS in fact appointed a candidacy committee for the institution. Unlike Northern Virginia Law School, the Institute positively responded to SACS' criteria requiring full-time faculty appointments.

(c) The Virginia College received provisional approval to confer degrees in September 1985, and has its application for accreditation with the Association of Independent Colleges and Schools (AICS) pending and active. The Virginia College has not been denied accreditation review by AICS and is satisfying all criteria of the AICS to the knowledge of the Council.

(d) The Northern Virginia Law School's provisional approval was not extended by the Council following SACS' fifth denial of appointment of a candidate committee (the first step towards evaluation of eligibility of an institution for Candidate for Accreditation status under SACS criteria). Despite being provided more than adequate time (52 months), the law school failed not only to appoint the single full-time faculty member necessary for the appointment of a candidate committee by SACS, it also failed to address the requirement of four full-time faculty imposed by SACS for Candidate for Accreditation status.

(3) Only two of the said fifteen private institutions were granted longer periods to gain Candidate for Accreditation status than the Northern Virginia Law School. Of these, the Eastern Virginia Medical Authority held provisional approval for 58 months while successfully moving to SACS Candidate for Accreditation status, having satisfied the minimum faculty hiring criteria. During this period of provisional approval, the institution only offered its programs jointly with accredited and prestigious institutions: the College of William and Mary, Norfolk State University, and Old Dominion University. The second of these institutions, Notre Dame Apostolic Catechetical Institute, exhibited a record of responsiveness to the suggestions of SACS in establishing full-time faculty positions and has received appointment of a Candidate Committee. Its prospects for full accreditation appear promising. In

neither case was there a denial of accreditation or a record of denials of the appointment of candidate committee.

(4) In addition to being denied a candidacy committee five times in three years by SACS, the Northern Virginia Law School still has offered no evidence that it has hired the four full-time faculty necessary for accreditation. In reality, the law school has made no progress towards SACS accreditation by declining to address this deficiency.

(5) Subsequent to the Council's denial of a further extension of provisional approval to the Northern Virginia Law School, the school suggested to the hearing officer on or about May 8, 1987 that it had identified a faculty member who might qualify for a full-time faculty appointment. This belated discovery demonstrates no positive effort on behalf of Northern Virginia Law School to meet SACS' criteria and still fails to meet the requirement of four full-time faculty members required by SACS for accreditation. In addition, this belated discovery in May 1987 occurred ten months after the Council's denial and 62 months after the institution had received its initial provisional approval from the Council to confer degrees. To this date and despite five applications to SACS, there has been no change of position by SACS regarding Northern Virginia Law School's eligibility for accreditation.

(6) The private institutions that have achieved candidacy status after a period of provisional approval (CBN University, Christendom College, Eastern Virginia Medical Authority, Liberty University, Notre Dame Apostolic Catechetical Institute, and Virginia Wesleyan College) held approval for an average of 41 months.

(7) Based upon the objective record of private institutions seeking accreditation while provisionally approved to confer degrees, the Council revised its regulations, effective August 1, 1987, to limit successive terms of provisional approval during which institutions must gain Candidate for Accreditation Status and full accreditation, respectively, to a maximum of five years for each term. Moreover, each provisionally approved institution that had not received candidacy for accreditation status by the effective date of the new regulations must reapply for a new three-year term of approval when its current term expires.

(8) Pursuant to the new regulations, any institution whose approval is denied or revoked by the Council may submit a new application for approval at any time.

NOW, THEREFORE, the State Council of Higher Education for Virginia, in accordance with the Court's remand, hereby articulates the objective bases for its determination that Northern Virginia Law School failed to make satisfactory progress towards accreditation. The bases

were: (1) the extended period of time previously granted the institution to gain accreditation, (2) the failure of the institution to satisfy the criteria of the accrediting body, specifically the lack of any affirmative effort to have in place within an extended period of provisional approval the requisite faculty appointments for accreditation by SACS, (3) and importantly, the accrediting body's record of refusal to review the Law School for accreditation during its period of provisional approval. The Council maintains that the foregoing is also consistent with the treatment accorded all comparable institutions in the Commonwealth.

The Council directs that the Law School be promptly notified in writing of the foregoing.

ACCREDITATION STATUS OF VIRGINIA PRIVATE INSTITUTIONS THAT HAVE RECEIVED APPROVAL FROM THE COUNCIL OF HIGHER EDUCATION TO CONFER DEGREES, July 1, 1970 - August 31, 1988

Institution Seeking Initial Accreditation	Degree Level	Recognized Accrediting Body	Provisional Approval Granted By Council	Candidacy			Full Accreditation Granted
				Months As Applicant	Candidacy Granted	Months Held	
CBN University	Master's	SACS	Aug. 1979	41	Dec. 84	24	Dec. 84
CHRV College Health Sciences	Associate	SACS	May 1985		——	18	Dec. 86
Christendom College	Baccalaureate	SACS	June 1980	43	Dec. 83	48	Dec. 87
Commonwealth College (Hampton)	Associate	AICS	June 1987		——	1	July 87
Commonwealth College (Norfolk)	Associate	AICS	June 1987		——	1	July 87
Commonwealth College (Va. Beach)	Associate	AICS	June 1987		——	1	July 87
Eastern Va. Medical School	First Professional	LCME	May 1974		June 73	34	April 76
Eastern Va. Medical Authority[1]	Masters, Doctoral[1]	SACS	Feb. 1978	58[1]	Dec. 82	24	Dec. 84
Katharine Gibbs School	Associate	AICS	Nov. 1985		——	7	May 86
Liberty University	Baccalaureate	AICS	April 1974	38	June 77	42	Dec. 80
National Graduate University[2]	Master's	(SACS)[2]	Jan. 1980 (Mar. 1983)[2]	24	(Dec. 82)[2] (Denied)[2]		
Northern Virginia Law School[3]	First Professional	(SACS)[3]	Apr. 1982 (Aug. 1986)[3]	52	(Jy. 86)[3] (Denied)[3]		
Notre Dame Apostolic Cat. Inst.[4]	Master's	(SACS)[4]	July 1983 May 1988[4]	58 4			
Virginia College	Associate	(AICS)	Sept. 1985	35			
Virginia Wesleyan College	Baccalaureate	SACS	May 1969	7	Dec. 69	12	Dec. 70

[1]All degrees offered by Eastern Virginia Medical Authority are joint programs with either the College of William and Mary, Norfolk State University, or Old Dominion University, all of which are fully accredited by the Southern Association of Colleges and Schools. This relationship complicated the institutions's application for SACS accreditation and resulted in a protracted review process before Candidacy Status was granted.

[2]National Graduate University applied for SACS accreditation, received a Candidate Committee site visit, and was denied Candidate for Accreditation status in December 1982. The Council then revoked the insitution's provisional approval to confer degrees in March 1983.

[3]Northern Virginia Law School repeatedly applied to SACS for accreditation but was denied appointment of a Candidate Committee. After the fifth denial by SACS within a three-year period, the Council in August 1986 denied the institution any further extension of provisional approval for failure to maintain satisfactory progress towards gaining accreditation.

[4]Notre Dame Apostolic Catechetical Institute, having received two extensions of its initial term of provisional approval, reapplied for a new term in accordance with the Council's revised approval regulation (1987). The institution also responded to guidance from SACS in establishing full-time faculty positions, and in June 1988 received both a new term of provisional approval from the Council and appointment of a Candidate Committee by SACS.

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FEB 24 1989

(3)

NO. 88-1204

IN THE
Supreme Court Of The United States
OCTOBER TERM, 1988

ALFRED AVINS & NORTHERN VIRGINIA LAW SCHOOL, INC.,
Petitioners,

v.

VIRGINIA COUNCIL OF HIGHER EDUCATION, ET AL.,
Respondents,

and

STANLEY E. HARRISON, ET AL..,
Respondents.

On Petition for Writ of Certiorari from the Supreme Court of Virginia

BRIEF OF THE COALITION FOR RELIGIOUS FREEDOM AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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IN THE

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NO. 88-1204

ALFRED AVINS & NORTHERN VIRGINIA LAW SCHOOL, INC.,
Petitioners,

v.

VIRGINIA COUNCIL OF HIGHER EDUCATION, *et al.*,
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and

STANLEY E. HARRISON, *et al..*,
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On Petition for Writ of Certiorari from the Supreme Court of Virginia

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BRIEF OF THE COALITION FOR RELIGIOUS FREEDOM AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Coalition for Religious Freedom petitions the Court seeking leave to file a brief *amicus curiae* in support of the petition for writ of certiorari filed by Avins, *et. al.*, in their dispute with the Virginia Council of Higher Education, now pending before this honorable Court.

The state parties, through their legal representative, the office of the attorney general of Virginia, has refused to consent to the Coalition's request to file a brief *amicus curiae* in this matter. Unfortunately, the state views the matter as a simple one of merely local interest.

For proponent amicus, however, the case presents issues of far reaching consequence both on the substantive issues of free speech and on statutory concerns related to the effectiveness of Section 1983.

Without fully setting out the arguments for granting the writ, proponent amicus asserts the issues at the heart of this litigation to be content-based regulation of speech and the proper scope of Section 1983 remedies: matters that were treated superficially below and deserve this Court's attention.

Because the parties have failed to provide an analysis which will sharpen the Court's focus on these issues, the Coalition hopes to aid the Court in this matter.

INTEREST OF AMICUS

Proponent Amicus Coalition for Religious Freedom is a non-profit, tax-exempt corporation first organized in the District of Columbia on June 12, 1984 under the name Committee for Religious Freedom. The Coalition is engaged in efforts to inform the public about the importance of religious freedom and to highlight instances of intrusion upon religious liberties. Its informational programs include publications, documentary films, educational conferences and a monthly newspaper, "The Religious Freedom Alert." The Coalition is supported by contributions from the public, from businesses and other non-profit organizations

In addition to its general informational activities, the Coalition assists in the education of local communities and government officials on constitutional guarantees of religious liberty in situations where a specific breach of First Amendment liberties has been alleged. In numerous cases, the Coalition has assisted parties engaged in disputes over licensing of church ministries by providing an objective constitutional framework for understanding and analyzing the legitimate interests of the church and the state.

SUMMARY OF ARGUMENT

The petition for certiorari should be granted because it presents major public questions related to free speech: identifying the Constitutional limitations of coercive state power to regulate speech on the basis of content. Further, the case requires a determination of the proper remedial scope of

Section 1983, and requires that this Court vindicate *Erie* principles by insuring that substantive law equality between parties who bring 1983 actions in state and federal courts be maintained.

This matter is appropriate for review under the writ because the state court decided a federal question in a way that conflicts with both the holding of other state courts and the federal court of appeals. *See* Rule 17(b). Further, the holding below presents important questions of federal law which either have been settled or should be settled by this Court. Rule 17(c).

The trial court erred in dismissing the Section 1983 action as improperly based on a theory of *respondeat superior*, where personal involvement of the state officer was alleged. The decision is counter to the relevant holding of the U.S. Court of Appeals for the Fourth Circuit.

The trial court erred in determining that only the individual council members, and not the corporate body, were proper defendants in a Section 1983 action. Where the plaintiff sought only injunctive relief, the holdings of this Court find no Eleventh Amendment ban.

The refusal to permit the plaintiff below to amend his complaint to reach the state officers in their individual capacity violated established federal procedure for Section 1983. Because this is outcome determinative it violates *Erie* principles by failing to assure the litigant in state court the same substantive federal rights as one in federal court.

The trial court erred in failing to consider charges of content-based regulation of speech in dismissing First Amendment claims related to license renewal.

Consistent with Rule 17, the court should issue the writ and review these important questions.

STATEMENT OF THE CASE

In April 1982, the Northern Virginia Law School was granted approval by the Virginia Council of Higher Education (Council) to confer the degree of Juris Doctor, and was obligated to seek accreditation from the American Bar Association or other approved accrediting body. *Avins, et al v. Virginia Council of Higher Education, et al*, Chancery No. 18065 (Ltr. decision, dated 2/26/1988, p. 4). The school was

authorized to enroll students in 1980, and a 1982 inspection visit by the Council's staff resulted in a favorable report.

In 1986, the school attempted to organize a summer program in "conservative law" but was unable to secure enrollment due to insufficient interest. Students from other schools could not transfer credit from Northern Virginia Law School because it was not accredited by the American Bar Association. In the following year, in an effort to overcome the enrollment problem, the school petitioned the Council to permit students from accredited law schools in the state to attend the summer program in violation of the A.B.A. rule only permitting credit for work completed at other A.B.A. accredited institutions.

In response the state not only prohibited the school from teaching the conservative law class to students of other law schools but to its own students as well. The state Attorney General's office, writing in behalf of the Council, threatened criminal prosecution if the class were taught in summer. The Board of Directors voted not to offer the class.

Charging both state statutory and federal constitutional law violations, the school sought relief in a state court action. The school's multi-count complaint was dismissed in separate letter opinions by the Circuit Court of Alexandria, Virginia dated February 26, 1988 and July 14, 1988 by Judge Alfred D. Swersky.

In addition to state law claims, the plaintiff had alleged that first the denial of permission to teach the class, and later revocation of the school's certificate were motivated by improper political considerations and constituted impermissible content-based regulation of speech.

An appeal to the Virginia Supreme Court proved fruitless, and action was taken to gain review by this honorable court.

ARGUMENTS FOR GRANTING THE WRIT

The episode under review in this lawsuit, a charge that a state agency acted out of political bias in suppressing speech, is a most serious one. The prospect becomes even more frightful when it is alleged that criminal prosecution was threatened against acts of pure speech and advocacy which presented no threat of immediate harm to anyone.

A review of the record of the court below reveals a failure to appreciate the seriousness of this charge of content-based discrimination, and to extract an appropriate explanation for it.

The court below committed serious error when it dismissed the Section 1983 action because it improperly mischaracterized the degree of personal involvement needed to hold a public official liable; improperly held that only the Council members, and not the Council, were proper party defendants; failed to permit the plaintiff to amend to include the individual defendants, and ignored a charge of content-based regulation of speech.

The charges of political discrimination by a state regulatory board are deeply disturbing and require the most careful judicial review. Yet, here the trial and later the reviewing appeals court appear to have short-circuited the process, and to have either ignored serious charges of misconduct, or to have applied improper legal standards in reviewing those charges.

This case presents serious public policy questions with broad implications. In addition to the content-based speech charges, this case invites the court to consider the sensitive relationship between a state board designated to insure the quality of educational programs—and in this episode one charged with the rigorous responsibility of providing professional education; and the academic freedom and speech rights of an institution and its instructors. Because this case involves complex issues of individual liberty and comprehensive regulation in the public interest, the court should review this case in order to insure that a proper balance has been struck.

The questions presented by the petitioner raised serious questions about the review process below. It is possible that the administrative process and its subsequent judicial review failed to accord sufficient weight to the speech or academic freedom rights of the parties.

Professional schools are not blank transfers of technique. Rather, they can and should challenge the presumptions and conventions of their chosen calling. Only in this way can the vigorous debate ensue which is the hallmark of a free society. But, if the process we use to ensure quality generates a timid rigid conformity, that minimal technical quality may be an empty shell, purchased at the price of a free marketplace of ideas.

The conflict between N.V.L.S. and the Council is neither unique nor isolated; rather, it may be proto-typical of a growing split between established forces and those who out of conscience seek to build new institutions to challenge or spur established professional institutions. Should those with a special calling be effectively silenced in this critical theater, and at what costs? Under the flag of professional standards, experts attempt to convey their moral preferences as value-free expertise. Sadly, they may attempt to silence dissent not in the name of conformity, for our system knows no doctrine or official creed, but in the public interest.

In this case the further charge is alleged that partisan bias colored the proceedings, taking these charges as true as must be the case on motions to dismiss, a court should have more vigorously reviewed this matter.

I. THE TRIAL COURT ERRED IN DISMISSING THE SECTION 1983 ACTION AS IMPROPERLY BASED ON A THEORY OF *RESPONDEAT SUPERIOR*, WHERE PERSONAL INVOLVEMENT OF THE STATE OFFICER WAS ALLEGED.

Count I of Avins' complaint charged Virginia Attorney General Terry with violation of the school's rights by acting through an assistant attorney general to enforce the mandates of the Council; and further she is accused of threatening the plaintiffs with criminal prosecution for their speech activities related to the conservative law class.

The court dismissed the claims, holding that they were insufficient as a matter of law to impose personal liability because they involved no charge of personal conduct, only charges of *respondeat superior*. The court cited *Vinnedge v. Gibbs*, 550 F.2d 926 (4th Cir. 1977).

The court's reliance upon this case is misplaced, as the trial court's interpretation of *respondeat superior* was misdirected. In *Vinnedge*, a prisoner claiming violation of his constitutional rights because he was denied medical care sued a host of state officials. Among the group was Gibbs who had administrative responsibility for setting standards for jails. However, the immediate responsibility for the prisoners' medical care was by statute fixed in another officer. 550 F.2d 926, 928 (4th Cir. 1977).

Here the court rejected the claim, noting that "the doctrine of *respondeat superior* has no application under this section." *Id.* But this applies only where the plaintiff fails "to allege any personal connection between" the officer "and denial of constitutional rights." 550 F.2d at 928.

Here the plaintiff asserts the requisite personal connection. The Attorney General in both official and personal capacity is charged with involvement. Here it is not charged that the agent acted independently or without the knowledge of the principal. Rather, it is charged the agent acted at the instruction of the principal who acted out of bad political motive.

While the petition was terse it was sufficient to escape summary dismissal because it charged personal "connection." The court erred in presuming that the acts of a subordinate could not be charged to a principal once it was asserted the principal acted out of a bad motive in authorizing administrative action by the subordinates.

II. THE TRIAL COURT ERRED IN DETERMINING THAT ONLY THE INDIVIDUAL COUNCIL MEMBERS AND NOT THE COUNCIL WERE PROPER DEFENDANTS IN A SECTION 1983 ACTION.

The court below erred when it held that, "The Council is not a person within the meaning of Section 1983...." Letter decision, February 26, 1988, p. 2. The court cites no authority to support the contention that a corporate body may not be a proper Section 1983 defendant.

A state or its agencies may be "persons" within the meaning of Section 1983, and without violation of sovereignty immunity where an action proceeds in state court and only perspective relief is sought. *See, Gumbhir v. Kansas State Board of Pharmacy,* 231 Kan. at 513, 646 P.2d at 1084. *See also, Ramah Navajo School Board v. Bureau of Revenue,* 720 P.2d 1243, 1249 (N.M. App. 1986); *Woodbridge v. Worcester State Hospital,* 384 Mass. 38, 44, 423 N.E.2d 782, 786 n. 7 (1981).

Where, as here, the relief sought is injunctive, a state agency is broadly held to be a proper person within the meaning of Section 1983. *See, Scheuer v. Rhodes,* 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1984); *Edelman v. Jordan,* 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974) (permitting injunctive relief).

But here again the court's failure to spell out its logic places the summary nature of its holding in doubt. At least it should be remanded for a more specific statement.

An additional consideration the Court should weigh is that, so far as is practical, the choice of forum should be a neutral factor in the vindication of federal rights. If it emerges that the outcome under Virginia policy relating to sovereign immunity produces a different, and less liberal, result than the application of Eleventh Amendment immunity in a federal court in Virginia, then an unreasonable forum-based disparity exists which should be reviewed. For this reason this Court has held hwere state proceedures unduly restrict a litigant's opportunity to assert a federal right, the state must use federal proceedures. *Dice v. Akron, Canton & Youngstown RR.*, 342 U.S. 359, 72 S.Ct. 312, 96 L.Ed.2d 398 (1952).

III. THE TRIAL COURT ERRED IN FAILING TO PERMIT THE PLAINTIFF TO AMEND HIS PETITION TO INCLUDE COUNCIL MEMBERS IN THEIR INDIVIDUAL CAPACITIES.

Even assuming that the Council was not a person within the meaning of Section 1983, it was error for the trial court to deny the plaintiff to include these indispensable parties.

Whatever the state practice may be where a federal claim is involved local procedural rules should not be permitted to become outcome-determinative in contravention of liberal substantive federal policy.

In federal practice it would be error to dismiss a Section 1983 claim, where it could be salvaged by amendment to include parties. Before a petition can be dismissed it must be clear that a plaintiff cannot plea grounds to maintain the action. See: *Kelson v. City of Springfield*, 767 F.2d 651 (9th Cir. 1985); *Berndt v. State of Tennessee*, 796 F.2d 879 (6th Cir. 1986).

Only two allegations are necessary to support a Section 1983 claim: a charge that a federal right was deprived, and the charge that it was by state action. *Gomez v. Toledo*, 446 U.S. 635, 640, 100 S.Ct. 1920, 1923, 64 L. Ed.2d 572 (1980).

Here the charge that free speech rights were denied on a content basis by a state agency in violation of the First Amendment met the requirement for a proper pleading of a

1983 charge. Given this predicate the court should have permitted the party to amend.

IV. THE TRIAL COURT ERRED IN FAILING TO CONSIDER CHARGES OF CONTENT-BASED REGULATION OF SPEECH IN DISMISSING FIRST AMENDMENT CLAIMS RELATED TO LICENSE RENEWAL.

The trial court erred in dismissing Avins' claims without first evaluating the significance of alleged content-based discrimination in violation of the First Amendment. The court presumes that First Amendment rights were not violated because despite the state action the school remained free to offer the course on a non-credit basis. So generous a rule can only apply where the state action is neutral.

The trial court erred in placing its reliance on *Shelton College v. State Board of Education*, 226 A.2d 612 (New Jersey, 1967). *Shelton* stood for the general proposition that the state could regulate the award of college degrees; however, the holding recognized the danger of content-based regulation. It supported the state agency action only when "there is no proof whatever that the state board is bearing down upon Shelton [the school] because of Shelton's convictions upon a topic." 226 A.2d at 620.

In the instant case just such an improper content-based discrimination is charged. It is well established that a right otherwise clearly within the state's power may be lost where the state acts from bad motive. Here even assuming that the state has control over individual course content, it is wrong to exercise that power to punish unpopular beliefs. Where such an allegation is of record the court must address it . However, the court below appears to have ignored these serious problems because of confusion over the requirements of a Section 1983 action.

CONCLUSION

While regulation of schools and colleges may be a public necessity, its abuse on content-based speech grounds is a serious threat to a free society and the marketplace of ideas. A charge of intimidation of speech by threat of criminal prosecution should be given the careful review. Speech is all

too quickly chilled. The court below failed to properly protect the First Amendment interest.

As set forth above, the petition for certiorari should be granted because it presents major public questions related to free speech: identifying the Constitutional limitations of coercive state power to regulate speech on the basis of conduct. Further, the case requires a determination of the proper remedial scope of Section 1983, and requires that this Court vindicate *Erie* principles by insuring that substantive law equality between parties who bring 1983 actions in state and federal courts be maintained.

This matter is appropriate for review under the writ because the state court decided a federal question in a way that conflicts with both the holding of other state courts and the federal court of appeals. *See* Rule 17(b). Further, the holding below presents important questions of federal law which either have been settled or should be settled by this Court. Rule 17(c).

The court below committed repeated errors of law and policy related to Section 1983 action. The case could be of far-reaching consequences. It gives the court an opportunity to address these issues and aid other courts in avoiding error. Consistent with Rule 17, the court should issue the writ and review these important questions.

Respecfully submitted,

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No. 88-1204

UNITED STATES SUPREME COURT

October Term, 1988

ALFRED AVINS and NORTHERN VIRGINIA LAW SCHOOL, Petitioners,

v.

VIRGINIA COUNCIL OF HIGHER EDUCATION, STANLEY E. HARRISON, JOAN S. JONES, WILLIAM C. BATTLE, ROBERT L. BURRUS, WHITTINGTON W. CLEMENT, BERNARD J. HAGGERTY, RUBY G. MARTIN, HUGH L. PATTERSON, ABE J. SPERO, WILLIAM B. SPONG, Jr., STEPHEN J. WRIGHT, and ATTORNEY GENERAL MARY SUE TERRY by RICHARD C. KAST,
Respondents

Petition for a Writ of Certiorari to the Supreme Court of Virginia

REPLY BRIEF

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RECEIVED
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REPLY BRIEF

The Attorney-General's brief in opposition is seriously misleading, both as to alleged question presented, factual statements, reasons for denying the writ, and documents appended thereto. This brief relates not to this case but to a companion case now pending before the Virginia Court of Appeals.

The confusion arises from the bifurcated appellate structure in Virginia. Both appeals from state administrative agencies and original actions against its members under 42 U.S.C. sec. 1983 are heard in the state trial court of general jurisdiction, the Circuit Court. However, decisions of the Circuit Court affirming the agency's action are taken to the Court of Appeals, while dismissals of complaints brought under 42 U.S.C. sec. 1983 are taken to the state Supreme Court. The Supreme Court has rendered a final judgment against pe-

titioners in the 1983 complaint while the Court of Appeals has not yet heard the administrative appeals. The question allegedly presented, the documents set forth in the Appendix, and the bulk of the Attorney-General's statement of the case and the reasons set forth for denying the writ relate to the Council's position in the administrative appeal and totally ignore the complaint under 42 U.S.C. sec. 1983, the anti-trust claim, and the other federal claims of petitioners.

It is amazing to find the Attorney-General asserting:

> "The Council has not told NVLS what it can or cannot teach, nor has it told Avins what he can or cannot say." (Brief in opposition, page 3)

This brief in opposition is signed by Assistant Attorney General Richard C. Kast as "Counsel of Record," the very same Assistant named in the caption of this case because he signed the letter of May 7,

1987, which the Circuit Court Judge explicitly held did not violate petitioners' First Amendment rights. (see app., p. 14) A copy of this letter is appended to this reply brief, and it clearly forbids petitioners to teach the conservative law summer course under threat of criminal and injunctive sanctions.

Contrary to the Attorney-General's assertion, there is no action for damages against the Council members based on this letter pending in any other court, nor is this letter the subject of injunctive proceedings either, elsewhere. Therefore, if the petition is not granted, NVLS and Avins will be without remedy for a clear infringement on their right of freedom of speech. The right of conservatives to teach law can only be vindicated if the petition is granted, and accordingly, the petition should be granted.

Respectfully submitted, ALFRED AVINS
Atty. for NVLS and pet. pro se.

March 1, 1989

APPENDIX

COMMONWEALTH OF VIRGINIA
Office of the Attorney General

May 7, 1987

Dear Dr. Avins:

The State Council of Higher Education met yesterday and considered the course offering in "conservative law" which you forwarded to me. The Council wished me to express to you its concern that your proceeding to offer this course is in contravention of its action in August of last year in declining to extend the period of limited provisional approval of the Northern Virginia Law School ("the School") to grant the J.D. degree. The Council is concerned that you would proceed to offer this course and wished me to call to your attention the following facts:

1. You have no authority to offer course credit toward the J.D. degree to students outside the School, nor to offer course credit for such non-required courses as this even to the students of the School.

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2. Offering this course in clear contravention of the Council's action, and with full knowledge that you have no authority to award course credit, may constitute consumer fraud, a matter being explored by this Office at this time.

3. Violation of the pertinent statutes of the Council regarding its authority to authorize the granting of degree credit constitutes a criminal violation.

The Council would urge you to decline to teach this course until your administrative appeal is resolved. While the Council has not at this point decided to initiate injunctive action against you, when it next meets on June 3, 1987, it will again consider this matter and what action, if any, you have taken to resolve the issues addressed in this letter.

Sincerely,

s/

Richard C. Kast
Assistant Attorney General